



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Kweyu (Criminal Appeal E080 of 2022)  
[2024] KEHC 16129 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16129 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E080 OF 2022  
REA OUGO, J  
DECEMBER 20, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**BASHIR OKHONGO KWEYU ..... RESPONDENT**

*(An appeal against the sentence of the accused person by Hon.  
T. Olando (PM) in Bungoma CR. SO E049/21 on 20/09/2022)*

**JUDGMENT**

1. The respondent was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) No.3 of 2006. The particulars of the offence were that on diverse dates between the months of March and May 2021 at [Particulars Withheld] within Bungoma County he intentionally caused his penis to penetrate the vagina of PNM, a child aged 10 years.
2. The respondent was convicted of the offence and sentenced to serve 5 years imprisonment. The prosecution being aggrieved with the sentence meted out on the accused person has lodged this appeal on the following grounds:
  1. That the learned trial magistrate erred by sentencing the accused person to serve an illegal sentence.
  2. That the learned magistrate erred by sentencing the accused person to serve a manifestly lenient sentence contrary to the provisions of section 8 (2) of the Sexual Offence [Act No 6 of 2006](#).
  3. That the learned magistrate erred by sentencing the accused in contravention of clear provisions of the law.
  4. The learned trial magistrate did not give any reasons for sentencing the accused to such a lenient sentence.



5. That the learned trial magistrate erroneously and intentionally granted a lenient sentence, without appreciating that he took over the matter at the tail end of sentencing.
6. That the appellant benefited from an illegal sentence.
3. This court directed that the parties file their respective written submissions.
4. The appellant submits that the complainant was 11 years old as per her birth certificate. Additionally, they produced her age assessment report. Due to the serious aggravating factors and the circumstances of the case, the age of the victim, the pain and injuries suffered; which injuries cover both physical, mental and long term emotional and psychological trauma (see Misc Criminal Application No E014 of 2021, *Rotike v Republic*). The sentence meted out by the trial magistrate was too low as section 8 (2) of the *Sexual Offences Act* provides for life imprisonment.
5. The respondent argues in his submissions that the appellant's appeal is malicious as it has no legal substance. The complainant was 11 years and 4 months old at the time of the offence. Section 8(2) of the *Sexual Offences Act* talks of a child who is 11 years and below. Therefore, the respondent ought to have been charged under section 8 (3) of the Act which contains a lesser sentence of 5 years. The respondent denied that he was not serving an illegal sentence as the sentence meted out was within the law.

### **Analysis And Determination**

6. The appellant in its appeal has only challenged the finding of the trial court on sentence only. The principles guiding interference with sentencing by the appellate Court, in my view, set out in the case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, pronounced itself on this issue as follows:
 

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
7. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that:
 

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”
8. In this case, it is not in dispute that the complainant was 11 years, 6 months at the time of the offence. The complainant was born on 10/10/2009. The alleged offence was committed between March and May of 2021. She was not yet 12 years.
9. The trial magistrate called for a probation report which recommended that due to the nature and sensitivity of the offence, they urged the court to apply its discretion in sentencing. The trial magistrate sentenced the respondent to 5 years imprisonment.
10. The trial court in sentencing the respondent was bound to consider the law on sentence as provided in the *Sexual Offences Act*. Section 8 (2) of the *Sexual Offences Act* provides that a person who commits



an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The respondent in his mitigation asked for the court's leniency. The Court of Appeal in Manyeso *v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment) found that the indeterminate sentence of life imprisonment was discriminatory, inhumane, and a violation of the right to human dignity. The Court of Appeal therefore substituted the life sentence with a sentence of 40 years' imprisonment.

11. Consequently, I find that the appeal is meritorious and is hereby allowed. The respondent shall serve a sentence of twenty-five (25) years imprisonment which shall run from the date of his conviction.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 20<sup>TH</sup> DAY OF DECEMBER 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Ayekha For the Appellant.

Bashir Okhongo Kweyu -Respondent in person

Wilkister -C/A

